# BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

**AB-9119**
File: 20-436264 Reg: 10072396

UNITED EL SEGUNDO, INC., dba Rapid Gas #75
21924 Devonshire Street, Chatsworth, CA 91311,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: March 3, 2011
Los Angeles, CA

ISSUED APRIL 26, 2011

United El Segundo, Inc., doing business as Rapid Gas #75 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk, Cecilia Mendez, having sold a 23.5-ounce can of Dragon Joose flavored malt beverage, an alcoholic beverage, to Henry Melchor, an 18-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant United El Segundo, Inc., appearing through its counsel, Ralph B. Saltsman and Soheyl Tahsildoost, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

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[1]The decision of the Department, dated June 3, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on January 8, 2009. On January 27, 2010, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor.

An administrative hearing was held on April 20, 2010, at which time documentary evidence was received and testimony concerning the violation charged was presented by Ryan Smith, a Los Angeles police officer; Henry Melchor, the minor decoy; Walter Flores, appellant's business operations manager; and David Duran, a Department Investigator.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and ordered appellant's license suspended for 15 days.

Appellant filed a timely notice of appeal in which it contends it was improperly prevented from demonstrating that the Department relied on an underground penalty in determining the penalty.

DISCUSSION

I

Appellant contends that the order of the administrative law judge (ALJ), quashing a subpoena served on a Department district manager, prevented it from demonstrating that the Department was relying on an underground regulation in determining the penalty. Appellant contends that the district manager, if allowed to testify, would have acknowledged that the Department has a policy regarding the length of discipline-free licensure and the recommended penalty that is not contained in the Penalty Guidelines adopted pursuant to rule 144.

There is nothing in appellant's brief that has not been said in numerous other briefs from appellant's counsel seeking to establish that the settlement recommendation made by a district manager in a pre-filing meeting is actually the product of a regulation that has not been adopted pursuant to the requirements of the Administrative Procedure Act (Gov. Code, §11342.600).

The ALJ was aware that a recommendation by a district manager is made initially as part of a settlement offer. He was also aware that any penalty he might propose would be based on the facts of the case established at the hearing and in accordance with the Department's Penalty Guidelines contained in rule 144 (4 Cal. Code Regs., §144), a regulation duly adopted pursuant to the APA. (See RT 10.)

The proposed testimony of the subpoenaed district manager, whatever it might have been, would not change the fact that the penalty imposed in this case was based on rule 144 and the facts of the case. Such testimony would have unnecessarily prolonged the proceedings for no useful purpose. The ALJ's order quashing the subpoena was well within his discretion.

The Board has addressed this issue many times, and has uniformly rejected the claims of appellant's counsel.[2] It does so here as well.

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[2] Since it was raised in embryonic form in 2009 (see *Cirrus Investments* (2009) AB-8766), this issue has been addressed by the Board at least 16 times, and rejected each time. *(Cirrus Investments* (March 12, 2009) AB-8766; *Randhawa* (May 19, 2010) AB-8973; *Yummy Foods LLC* (July 22, 2010) AB-8950; *7-Eleven, Inc./Del Rosario* (August 4, 2010) AB-8786; *7-Eleven, Inc./Raqba, Inc.* (August 5, 2010) AB-8988; *Chevron Stations, Inc.* (August 9, 2010) AB-8996*; 7-Eleven, Inc./Solanki* (August 9, 2010) AB-9019; *Murshed (August 9, 2010) AB-9073; Wong* (August 18, 2010) AB-8991; *7-Eleven, Inc./Triplett* (September 15, 2010) AB-8864; *7-Eleven, Inc./Salem Enterprises* (September 21, 2010) AB-8965; *Sharmeens Enterprises, Inc*. (October 25, 2010) AB-8782 (review denied November 5, 2010); *7-Eleven, Inc./Malldiv Associates* (December 7, 2010) AB-8951; *7-Eleven, Inc./Aziz* (December 9, 2010) AB-8980; *7-*

(continued...)

ORDER

The decision of the Department is affirmed.[3]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
MICHAEL A. PROSIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[2](...continued)
*Eleven, Inc./Ghuman & Sons, Inc. (*December 9, 2010) AB-8910*; Sharmeens Enterprises, Inc.* (December 9, 2010) AB-8781.)

[3] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.